TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 145.

THE TOWN OF MAHOMET, PLAINTIFF IN ERROR,

vs.

JOHN M. QUACKENBUSH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 25, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court of the United States for the southern district of Illinois, before you, between John M. Quackenbush, plaintiff, and the Town of Mahomet (in the State of Illinois), defendant, a manifest error hath happened, to the great damage of the said defendant, the Town of Mahomet, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
2 writ, so that you may have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said district, this 12th day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[The seal of the Circuit Court of the United States, South Dist. of Ill.]

J. A. JONES,
Clerk U. S. Cir. Court South. Dist. of Ills.

[Endorsed:] Supreme Court of the United States. Town of Mahomet, plaintiff in error, *vs.* John M. Quackenbush. Writ of Error. Filed August 12th, 1882. J. A. Jones, clerk.

3 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. John M. Harlan, one of the associate justices of the Supreme Court of the United States, presiding judge, and the Hon. Samuel H. Treat, district judge of said district and associate judge of said circuit court, on Tuesday, the 20th day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundredth and sixth year.

J. A. JONES, *Clerk.*

Assumpsit.

JOHN M. QUACKENBUSH
vs. } 6365.
TOWN OF MAHOMET.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

4 John M. Quackenbush, a citizen of the State of New York, plaintiff in this suit, puts in his place T. C. Mather, Esq., his attorney, against the Town of Mahomet, a body corporate and politic, organized under the laws of the State of Illinois, and located in said district, defendant, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 13th day of May, in the year of our Lord one thousand eight hundred and eighty-two, came the plaintiff, by his attorneys, and filed in the office of the clerk of said court his bond for costs in said cause; which bond is in the words and figures following, to wit:

Cost Bond.

CIRCUIT COURT UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

June Term, A. D. 1882.

JOHN M. QUACKENBUSH *vs.* THE TOWN OF MAHOMET.

In Assumpsit. Damages, $7,000.

5 I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 2d day of May, 1882.

T. C. MATHER.

(Endorsed): Filed May 13, A. D. 1882. J. A. Jones, clerk.

And afterwards, to wit, on the same day and in the year last aforesaid, there was issued out of said clerk's office a summons in said cause, directed to the marshal of said district, to execute, and which said summons and the return of said marshal thereto are in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

The United States of America to the marshal of the southern district of Illinois, Greeting:

6 We command you to summon the Town of Mahomet, if found in your district, to be and appear before our judges of our

circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto John M. Quackenbush of a plea of assumpsit, to his damage, as he alleges, of seven thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this thirteenth day of May, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and sixth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's Return.

I have duly served this writ by reading and delivering a copy of the same to G. F. Geiger, supervisor of said township, as I am therein commanded, this 22d day of May, A. D. 1882.

JACOB WHEELER, U. S. M.,
By WM. C. DEWEY, *Dep'ty.*

(Indorsed): Filed May 25, A. D. 1882. J. A. Jones, clerk.

7 And afterwards, to wit, on the 22nd day of May, in the year last aforesaid, came the plaintiff, by his attorney, and filed in the office of said clerk his declaration in said cause, which said declaration is in the words and figures following, to wit:

Declaration.

In Circuit Court. June Term, A. D. 1882.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

John M. Quackenbush, a citizen of the State of New York, plaintiff, by T. C. Mather, his attorney, complains of the Town of Mahomet, a body politic and corporate, organized and existing under the laws of the State of Illinois, and located in said southern district, defendant, of a plea of trespass on the case upon promises, for that whereas the said defendant heretofore, to wit, on the first day of October, A. D. 1867, at, to wit, the said southern district, in pursuance of the laws of the State of Illinois and a vote of the people of said town had at a special election held July 21, 1866, made its certain forty-three coupon bonds in writing, and then and there delivered the said bonds, by which said bonds said defendant then and there promised to pay to bearer at the maturity thereof
8 the several sums of money, to wit, one hundred dollars in and by each bond mentioned at the office of the county treasurer of said county.

By reason whereof, and by force of the statute in such case made and provided, the defendant became liable to pay to bearer the said sums of money in said bonds specified, according to the tenor and effect of the said bonds, and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year,

and at the district aforesaid, undertook, and then and there faithfully promised, well and truly to pay unto bearer the said sums of money on the said bonds specified, according to the tenor and effect of the said bonds.

And whereas, also, the defendant, on, to wit, the the twelfth day of May, 1882, at, to wit, said district, was, and still is, indebted to plaintiff in the sum of seven thousand dollars for money before that time paid, laid out, and expended by plaintiff for the use of defendant at its request; and in the sum of seven thousand dollars for money before then lent and accommodated by plaintiff to defendant at its request; and in the sum of seven thousand dollars for money before then had and received by defendant to use of plaintiff; and in the sum of seven thousand dollars before then due from defendant to plaintiff for interest upon divers large sums of money before then due from defendant to plaintiff and by
9 plaintiff forborne to defendant for long spaces of time before then elapsed at the request of defendant.

And being so indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the district aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sums of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, etc., to wit, on the day when the said bonds became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the district aforesaid, has not yet paid the several sums of money above mentioned, nor any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of seven thousand dollars, and therefore the said plaintiff brings suit, etc.

By T. C. MATHER,
His Att'y.

Copy of Bonds Sued On.

10 UNITED STATES OF AMERICA, *State of Illinois:*

No. 1. Middletown Township Railroad Bond. $100.

Know all men by these presents, that the township of Middletown, in the county of Champaign and State of Illinois, acknowledges itself to owe and be indebted in the sum of one hundred dollars, lawful money of the United States of America, which sum of money the said township of Middletown promises to pay to the order of——, at the office of the county treasurer of said county, on the first day of October, in the year one thousand eight hundred and seventy-seven, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of October in each year, at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois, entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company
11 and to extend the powers of and confer a charter upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held July 21st, 1866, in accordance with said act; and the faith of the township of Middletown is hereby pledged for the payment of the said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Middletown have subscribed this bond, this first day of October, one thousand eight hundred and sixty-seven.

J. E. COX, *Clerk.*

WASHINGTON NEBEKER, *Supervisor.*

The remaining bonds sued on in this case are fac-similes of the above bond, number one, except as to their numbers, which are as follows, to wit: Numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65.

Copy of Ac. Sued On.

The Town of Mahomet to John M. Quackenbush, Dr.

To money paid, laid out, and expended		$7,000
	Money lent and accommodated	$7,000
12	To money had and received	$7,000
"	" due on ac. interest	$7,000

(Indorsed:) "Filed May 22d, 1882. J. A. Jones, clerk."

And afterwards, to wit, on Monday, the fifth day of June, at the June term of said court, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

Rule on Def't to Plead.

JOHN M. QUACKENBUSH
vs. } 6365.
TOWN OF MAHOMET.

Assumpsit.

On motion of plaintiff, by T. C. Mather, Esq., his attorney, the defendant, having been regularly served with process, is ruled to plead herein by Wednesday, the 7th day of June, inst.

And afterwards, to wit, on the seventh day of June, in the year last aforesaid, came the defendant, by its attorneys, and filed in the office of said clerk its demurrer and plea in said cause, which are in the words and figures following, to wit:

13 *Demurrer and Plea.*

UNITED STATES OF AMERICA, *Southern District of Illinois:*

THE TOWN OF MAHOMET *ats* JOHN M. QUACKENBUSH.

Assumpsit.

And now comes the defendant, by Weldon & McNulta and R. A. Lemon, its attorneys, and as to the first count of the plaintiff's declaration says that the matters and things therein alleged and set forth in manner and form as therein alleged are not sufficient in law; wherefore the defendant prays judgment, etc.

By WELDON & McNULTA AND
R. A. LEMON, *its Att'ys.*

And the defendant, as to the second count of said declaration, comes and says that it did not undertake and promise in manner and form as the plaintiff has in that count of said declaration thereof complained against it, and this it prays may be enquired of by the country, etc.

By WELDON & McNULTA AND
R. A. LEMON, *its Att'ys.*

(Indorsed:) Filed June 7, 1882. J. A. Jones, clerk.

14 And afterwards, to wit, on Tuesday, the twentieth day of June, at the term and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Overruling Demurrer.

JOHN M. QUACKENBUSH
vs. } 6365.
TOWN OF MAHOMET.

Assumpsit.

This day this cause came on to be heard upon defendant's demurrer to plaintiff's declaration herein, and the court having heard argument of counsel, overrules said demurrer.

Finding and Judgment for Plaintiff.

JOHN M. QUACKENBUSH
vs. } 6365.
TOWN OF MAHOMET.

Assumpsit.

This day comes as well the plaintiff, by T. C. Mather, Esq., his attorney, as the defendant, by Messrs. Weldon and McNulta, its attorneys, and the issue joined, by consent, is tried by the court, a jury being waived; and the court having heard the evidence and

arguments of counsel finds the issue for the plaintiff, and assesses his damages to the sum of five thousand eight hundred and ninety-nine dollars and thirty-four cents ($5,899.34).

15 It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of five thousand eight hundred and ninety-nine dollars and thirty-four cents, his damages aforesaid assessed, together with the sum of thirty-nine dollars and seventy cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

And, to wit, on the day and year last aforesaid there was filed in the office of said clerk the following certificate of evidence and division of opinion in said cause, to wit:

Certificate of Evidence and Division of Opinion.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, 1882.

JOHN M. QUACKENBUSH *vs.* THE TOWNSHIP OF MAHOMET.

In Assumpsit.

Present: John M. Harlan, circuit justice; Samuel H. Treat, district judge.

On the trial of this cause, before the above-named judges, without the intervention of a jury, by consent of parties, the plain-

16 tiff, to maintain the issues on his part, offered in evidence forty-three bonds, each being fac-similies of the others, except numbers, one of which bonds is in words and figures, as follows:

Copy of Township Bonds.

UNITED STATES OF AMERICA.

State of Illinois.

No. —. Middletown Township Railroad Bond. $100.

Know all men by these presents that the township of Middletown, in the county of Champaign and State of Illinois, acknowledges itself to owe and be indebted in the sum of one hundred dollars, lawful money of the United States of America, which sum of money the said township of Middletown promises to pay to the order of ———, at the office of the county treasurer of said county, on the first day of October, in the year one thousand eight hundred and seventy-seven, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of October on each year, at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois, entitled "An act to amend the articles of association

17 of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter

upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held July 21st, 1866, in accordance with said act. And the faith of the township of Middletown is hereby pledged for the payment of the said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Middletown have subscribed this bond this first day of October, one thousand eight hundred and sixty-seven.

J. E. COX, *Clerk.*

WASHINGTON NEBEKER, *Supervisor.*

(Endorsed on the back as follows:)

AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *August* 19, 1872.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

18 In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[L. S.] C. E. LIPPINCOTT,
Auditor P. A.

(Indorsed:) Filed and judgment rendered June 20, '82. J. A. Jones, clerk.

Plaintiff further offered evidence to show that at the time said bonds and coupons were issued said town, by its supervisor, subscribed for an equal amount in shares of stock in the D., U., B. & P. R. R. Co., and that the shares were delivered to said Town of Mahomet and are still retained by it, and further offered evidence to show that said town has paid the interest on said bonds for ten years without objection.

And defendant offered on the trial to return the stock to the bondholders.

The above and foregoing was all the evidence offered in said cause on the trial thereof.

Upon the demurrer to the special count of the declaration, as well as upon the evidence so adduced upon the trial of said cause, the following questions arose and occurred, to wit:

1st. Was there any law in force in the State of Illinois on the 21st day of July, 1866, authorizing said township to vote
19 upon the question of issuing these bonds or authorizing their issue?

2nd. Whether under the constitution of Illinois of 1848 the Legislature had the power to pass the act referred to in the bonds in evidence so as to legalize the election of July 21st, 1866?

3rd. Whether the special election of July 21st, 1866, in the absence of any statute authorizing such election, was legal and valid when such election was held, or was made legal and valid by virtue of the act of the Legislature of 1867, referred to in said bonds?

4th. Did the vote or special election aforesaid create a legal liability against the defendant by virtue of the act of Feb'y 28th, 1867?

5th. Did the corporate authorities of the defendant authorize the creation of the debt and the issue of the bonds in evidence?

6th. Had the Legislature the power to enact the curative or retrospective provision in said act so as to make legal and valid said special election held before said act was passed, and in the absence of any law authorizing township to subscribe to the capital stock of said railroad company, and to issue its bonds therefor?

7th. Does the act of February 28th, 1867, make the bonds binding on the township as if the subscription had been authorized by law and voted for after the act had been passed?

20 8th. Whether any cause of action is established in law against the defendant upon the evidence in the case.

And the opinion of the said judges being opposed upon the points and questions before stated they hereby certify the facts so found and admitted on the trial, and the said several questions upon which their opinions were opposed, according to the statute in such case made and provided.

And judgment is entered in accordance with the opinion of circuit justice.

JOHN M. HARLAN,
Circuit Justice.
S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed June 20th, 1882. J. A. Jones, clerk.

And afterward, to wit, on the 12th day of August, in the year last aforesaid, came the defendant and filed in said clerk's office its bond on writ of error in said cause, which bond was approved by the court, and is in the words and figures following, to wit:

21 *Bond on Writ of Error.*

In the Circuit Court of the United States for the Southern District of Illinois.

JOHN M. QUACKENBUSH *vs.* TOWNSHIP OF MAHOMET.

Assumpsit.

Know all men by these presents that we, The Township of Mahomet and ———, are held and firmly bound unto John M. Quackenbush in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said John M. Quackenbush, his heirs, executors or administrators; to which payments, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 10th day of August, A. D. 1882.

Whereas the above-named Township of Mahomet hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

22 Now, therefore, the condition of this obligation is such that if the above-named Township of Mahomet shall prosecute its said writ of error to effect, and shall answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE TOWNSHIP OF MAHOMET. [SEAL.]
By G. F. GEIGER, *Supervisor.* [SEAL.]
R. A. LEMON. [SEAL.]

Sealed and delivered in the presence of—
G. F. GEIGER,
J. C. PITTMANN.
JOEL M. BARLOW.
J. C. KILLGORE.
E. C. HAYWOOD.
J. H. WEST.
JOS. D. TAYLOR.
J. W. BLUE.
JO. MAXWELL.

Approved.

S. H. TREAT,
District Judge.

(Endorsed:) Filed August 12th, 1882. J. A. Jones, clerk.

23 *Clerk's Certificate.*

In the United States Circuit Court.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and the proceedings thereon had, in a certain cause lately pending in said court, wherein John M. Quackenbush was plaintiff and the Town of Mahomet (in the State of Illinois) was defendant, as fully as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 7th day of October, in the year of our Lord one thousand eight hundred and eight-two, and of our Independence the one hundred and seventh year.

[The seal of the Circuit Court of the United States for the South. Dist. of Ill.]

J. A. JONES, *Clerk.*

24 *Citation.*

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To John M. Quackenbush, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the Town of Mahomet (in the State of Illinois) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 12th day of August, in the year of our Lord 1882, and of our Independence the 107th year.

S. H. TREAT,
Dist. Judge U. S., South'n Dist. of Ill's.

25 I acknowledge service of the above citation on me, this Oct. 9th, 1882.

T. C. MATHER,
Att'y for Quackenbush.

[Endorsed:] Supreme Court of the United States. Town of Mahomet, plaintiff in error, *vs.* John M. Quackenbush. Citation.

26 *Error to Circuit Court U. S. for Southern Dist. Ills.*

UNITED STATES OF AMERICA:

Supreme Court. October Term, 1882.

THE TOWNSHIP OF MAHOMET, Plaintiff in Error,
vs.
JOHN M. QUACKENBUSH, Defendant in Error.

And now comes the plaintiff in error, by Weldon & McNulta and R. A. Lemon, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this—

1st. The judgment of the court below is contrary to the law and evidence.

Wherefore the plaintiff in error prays that said judgment be reversed, etc.

By WELDON & McNULTA & R. A. LEMON,
Plff's Att'ys.

Endorsed on cover: S. Illinois C. C. U. S. No. 145. The Town of Mahomet, plaintiff in error, *vs.* John M. Quackenbush. Filed 25th October, 1882.

117-508

SUPREME COURT, U. S.
FILED
MAR 11 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1885.

THE TOWNSHIP OF MAHOMET,
—vs.—
JOHN M. QUACKENBUSH.

No. 145.

In Error to the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT.

JOHN McNULTA,
R. A. LEMON,
Attys. for Plaintiff in Error.

PANTAGRAPH CO

In the Supreme Court of the United States,

October Term, A. D. 1885.

No. 145.

TOWNSHIP OF MAHOMET,

vs.

JOHN M. QUACKENBUSH.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT.

The plaintiff in error is a corporation under the Constitution and laws of the state of Illinois, organized for the purpose of local government, with certain powers, limited to certain specific things, and to be exercised in definite ways and forms. In the year 1866 a railroad company, under articles of association, proposed to build a railroad through the territory embraced in the jurisdiction of the plaintiff in error.

In pursuance of that purpose a pretended election was held by the people of the township, July 21, A. D. 1866, at which election it is claimed that it was decided to issue $50,000 of the bonds of the said plaintiff to aid in the construction of said railroad. Said vote was to issue bonds to the Danville, Urbana, Bloomington & Pekin Railroad Company.

At the time said election was held there was no general or special law authorizing such an election or such a subscription by townships. No other election was held in said township on the subject of the subscription to said company. On the 28th of February, 1867, the legislature passed an act entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers and to confer a charter on the same."

—Private laws of Illinois, 1867, Vol. 2, p. 758.

The following are the material provisions of the act of February 28, 1867:

SEC. 9. Counties, cities, towns or townships through which said (road) is to pass or along the route thereof *which have held* or shall hold elections upon the question of subscribing to the capital stock of said company, *as by this act*, or by any general law of this state, required or permitted, shall, upon any such election being held or carried in favor of so subscribing, adopt the subscriptions of such county, city, town or township, now made to said capital stock, under said articles of association, or a part of their subscription; and upon the issue of stock by said counties, cities, towns or townships, such citizens shall, by the board of directors, be released from individual liability therefor.

* * * * * * * * * * * *

SEC. 12. To further aid in the construction of said road by said company, any incorporated town or township, in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding two hundred thousand dollars.

SEC. 13. No such subscription shall be made until the question has been submitted to the legal voters in such corporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships, as hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and tax-payers of such town or township for which he is clerk, and in which petition the amount proposed to be submitted shall be stated,

to post up notices in at least three public places in each town or township; and notices shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription. PROVIDED, *that when elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then, and in that case, no other election need be had;* AND THE AMOUNT SO VOTED FOR SHALL BE SUBSCRIBED AS IN THIS ACT PROVIDED; *and such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof, and all the provisions hereof had been complied with.*

SEC. 14. If it shall appear that a majority of all the legal voters of such towns or townships, voting at such elections, have voted "for subscription," it shall be the duty of the president of the board of trustees, or other chief executive officer, if incorporated towns, *and of the supervisor in townships*, to subscribe to the capital stock of said railroad company in the name of the said town or township, the amount so voted to be subscribed, and to receive from said company the proper certificate therefor. *He shall also execute to said company*, in the name of such towns or townships, bonds bearing interest at ten per cent. per annum, which shall run for a term of not more than twenty years; and the interest on the same shall be made payable annually; and which bonds shall be signed by said president, executive officer, *or supervisor*, and be attested by the clerk of the town or township in whose name the bonds are issued, and it shall be his duty to make out a record of the issuing of said bonds. Said bonds shall be delivered to the president or secretary of said company, for the use of said company.

In October, 1867, the supervisor and town clerk executed the bonds in controversy, and delivered the same to the said railroad company.

It is recited in said bonds: "This bond is issued under and by virtue of a law of the state of Illinois, entitled 'An act

to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend its powers and to confer a charter on the same, approved February 28, 1867,' and in accordance with the vote of the electors of said township, at the special election held July 21, 1886, in accordance with said act."

The first count of the declaration in this case alleges that the town of Mahomet issued its "*coupon* bonds in writing," in "pursuance of the laws of the state of Illinois and a vote of the people of said town had at a special election, held July 21, 1866."

The plaintiff in error demurred to this count, and the Court overruled said demurrer.

The defendant in error also filed the common money counts, and to these the plaintiff in error filed the plea of non-assumpsit.

The demurrer to the first count was simply overruled and no judgment rendered upon it, and the parties went to trial upon the second count and the issue made by the plea of non-assumpsit. (See printed record, page 6.)

The following questions arise in this cause:

It was error for the Court to render judgment against the town of Mahomet upon bonds purporting to be issued by the Township of *Middletown*. There is no allegation or pretense either in the declaration, evidence, findings, or in any part of the record, that the two corporations are identical, but the record shows that the judgment in this case is based upon the obligations, if such they may be called, of another town without any explanation or authority therefor.

The "copy of bonds sued on" and filed with the declaration, as in compliance with the statute requiring the plaintiff to file a copy of the instrument sued upon, with his declaration, purports to be the copy of a bond issued by some corporation by the name of the "Township of *Middletown*." (See printed record, pages 4 and 5.)

The certificate of findings and division of the Court shows that the only evidence offered by defendant in error to sustain the allegations of his declaration and maintain the issues on his

part was "forty-three bonds, each being fac similies of the others," and all purporting to have been issued by a corporation of the name of the Township of *Middletown*. (See printed record, pages 7 and 8.

Upon that evidence the Court below rendered judgment against the plaintiff in error (the Town of *Mahomet*) for $5,899.34. Upon the question of the constitutionality of the statute under which these bonds, by some means or other, were admitted in evidence, the judges of the court below seem to have been divided in opinion, and they ask this Court to answer the following questions:

1. Was there any law of the state of Illinois on the 21st day of July authorizing said township to vote upon the question of issuing these bonds, or authorizing their issue?

2. Whether under the constitution of Illinois of 1848 the legislature had the power to pass the act referred to in the bonds in evidence so as to legalize the election of July 21, 1866?

3. Whether the special election of July 21, 1866, in the absence of any statute authorizing such election, was legal and valid when such election was held, or was made legal and valid by virtue of the act of the legislature of 1867, referred to in said bonds?

4. Did the vote or special election aforesaid create a legal liability against the defendant by virtue of the act of February 28, 1867?

5. Did the corporate authorities of the defendant authorize the creation of the debt and the issue of the bonds in evidence?

6. Had the legislature the power to enact the curative or retrospective provision in said act so as to make legal and valid said special election held before said act was passed, and in the absence of any law authorizing the township to subscribe to the capital stock of said railroad company, and to issue its bonds therefor?

7. Does the act of February 28, 1867, make the bonds binding on the township as if the subscription had been authorized by law and voted for after the act had been passed?

8th. Whether any cause of action is established in law against the defendant upon the evidence in the case?

ASSIGNMENT OF ERRORS.

We desire to call the attention of the Court to the following errors assigned:

1. The Circuit Court erred in holding that the legislature of Illinois had the power, under the Constitution of 1848, to pass the act of February 28, 1867, so as to legalize the special election previously held in said township on July 21, 1866, by the supposed authority of which the bonds in suit were issued by the supervisor and town clerk.

2. The Circuit Court erred in holding that the corporate authorities of the defendant township authorized or consented to the creation of said debt and the issuing of bonds, or that such alleged bonds are the obligations of the defendant township.

3. The Circuit Court erred in holding the said bonds valid and binding, or that they were the bonds of the defendant, in the absence of any law authorizing the defendant township to vote, take stock, or issue bonds therefor at the time when said special election was held, August 4, 1866, and that the legislature had the power to afterwards legalize such void election.

4. The Circuit Court erred in holding that the act of February 28, 1867, made the bonds binding on the defendant township the same as though the subscription had been authorized by law, and voted for after the same had been enacted.

5. The Circuit Court erred in holding that any, or all of the facts averred as occurring subsequently to the issue of the bonds, amount to a ratification by the defendant township, or estop it from denying the validity of the alleged bonds.

6. The Circuit Court erred in rendering judgment against the defendant.

7. The Circuit Court erred in refusing to follow the decisions of the Supreme Court of Illinois upon the constitutional question involved in the case.

8. The Court erred in rendering judgment against the Town of Mahomet on bonds issued by the Town of Middletown.

BRIEF.

1. *At the time it is alleged that these bonds were voted, July* 21, 1866, *there was no law either general or special authorizing a township to hold an election, and vote a subscription to a railroad company.*

2. *There was not only no law authorizing such an election and subscription, but the township organization law then in force, prohibited the exercise of such a power on the part of the town.* "No town shall possess or exercise any corporate powers except such as are enumerated in this act or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

—Gross, Ill. Statutes of 1868, p. 738, Sec. 2 of Art. 2.

3. *The supposed election held on July* 21, 1866, "Was an idle form. Persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceeding as a nullity. The vote can no more be accepted as the action of the town, or as giving the consent of the town to the creation of this debt, than would a resolution adopted by the same number of persons at one of their dwellings, or in a casual encounter at a street corner."

—Marshall et al. vs. Silliman et al., 61 Ill., 224.

4. *The act of the legislature passed on the 28th day of February,* 1867, *was in violation of the Constitution of the State:* Because the subject matter of its provisions is not defined in its title, and it embraces two distinct subjects. The Constitution of 1848, in force in 1866, provides: "And no private or local law

which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

—Const. of 1848, Gross' Rev. Stat. 1868, p. 19, part of Sec. 22 of Art. 3.

—Middleport vs. Ætna Life Ins. Co., et al., 82 Ill., 565.

—President and Trustees of Lockport vs. Gaylord, 6 Ill., 276.

—The People vs. Chillenden, 32 Ill., 181.

5. *The act of February 28, 1867, is unconstitutional because it attempts to create a debt for the plaintiff in error without the assent of the corporate authority of the town.* From the many authorities on this point we cite the following as the most conclusive:

—Town of Elmwood vs. Marcy, 2d Otto, 294.

—Marshall vs. Silliman, 61 Ill., 219.

—Gaddis vs. Richland County, 92 Ill., 119.

—Barnes vs. Town of Lacon, 84 Ill., 461.

—Ryan vs. Lynch, 68 Ill., 161.

—Schaeffer et al. vs. Bonham et al., 95 Ill., 368.

6. *Without the assent of the corporate authority of the town to the issuing of these bonds, there can be no legal obligation created by them.*

—Williams vs. Town of Roberts, 88 Ill., 11.

ARGUMENT.

Considering first the opinion of this Court filed at the present term in Anderson, executor, etc. vs. The Township of Santa Anna, in which this Court sustains the constitutionality of the statute in question, we respectfully invite the attention of the Court to the points here presented with the hope that its views therein expressed may be modified, and that upon a consideration of the points made in this case, and either not made or not passed upon

by this Court in any of the cases involving the validity of the bonds alleged to be issued under the statute in controversy, that the Court will be satisfied that the views of the law held by us are correct, and that the judgment of the Court below should be reversed.

The constitutional question here is one of *power*, or in other words whether or not, under the Constitution of Illinois (1848) the legislature had the *power* to validate the vote and subscription pretended to be held and made, at a time when it is conceded the town was powerless to create the debt. It is not a question of the defective or irregular execution of a power. The cases of Cowgill vs. Long, 15 Ill., 202, and Schofield vs. Walkins, 22 Ill., 66, cited by this Court in Anderson vs. Santa Anna, were cases in which the *power* to levy the tax and do everything that was sought to be done was plenary, but the tax was certified at a different time from that provided by the law authorizing it. The subsequent legalizing act merely supplied that defect—cured that irregularity in the exercise of the *power* previously conferred. It merely gave form to the substance—the power. It did not assume to confer substance upon a mere shadow. While the irregularity was probably fatal to the collection of the tax, nevertheless the *power* to levy it resided in the corporation, and the curative acts merely supplied a remedy, which all concede is within the domain of legislative authority. The Keithsburg case, 34 Ill., 405, is not in point, as we think; for in that case the curative act was a charter of the town—not the railroad company. The corporate authorities of Keithsburg accepted of the charter burdened with the creation and payment of the debt. The charter became the organic law of the town, and when it was accepted the municipality consented to the creation of the debt, and enacted an ordinance providing for the issuance of the bonds, and could not then dispute the legality of the debt without denying the existence of the town under the charter which imposed the debt. The decision should not be weighed by the *obiter dictum* in the opinion, but by the case made and the question actually decided. A careful reading of that case will, we think, show that it belongs to a wholly different class of cases. We do not understand the rule in regard to the duty of this

Court in following the decisions of the State Courts to be as stated in Anderson vs. The Township of Santa Anna. It is there stated that "where rights have accrued before the State Court has announced its construction the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment."

In the case of Fairfield vs. County of Gallatin, 100 U. S., 47, this Court says: "And it has been held that this Court will abandon its former decision construing a state statute, if the State Courts have subsequently given it a different construction."

In Green vs. Neal's lessee, 6 Pet. 291, this Court overruled two of its previous decisions, under which rights had accrued, and follows a later construction of a local law by a State Court.

In Elmwood vs. Marcy, *supra*, this Court follows the decisions of the State Court, which announce doctrines diametrically opposed to those in St. Joseph vs. Rogers, 16 Wal., 644, previously announced, and actually recede from them.

—See, also, Sunydam vs. Williamson, 24 Howard 427.

We do not claim for the Supreme Court of Illinois that it has always been absolutely consistent in all of the language employed by the different justices who have written the opinions of the Court. But we do claim that if any Court was ever consistent in its *decisions* of any one question that it has maintained a consistency and uniformity of decision upon the constitutional question in this case which is almost unparalleled in the history of judicial proceedings, "and this we are ready to verify" by the solemn declarations of this Court in Elmwood vs. Marcy, *supra*.

It is conceded by counsel, and in the opinion of the Court, that the supposed election of July 21, 1866, of itself, had no binding force whatever. It was not the act of the corporate authorities. It had no more legal efficacy than the act of a mob. It was in direct controvention of the township organization law.

Could the act of the legislature, unaided by any act of the electors of the town, have placed this burden upon the town? Clearly not. It will not be contended that it could. "The corporate authorities * * * may be vested with power to assess

and collect taxes for corporate purposes." This excludes a construction that would vest this power in any other body, organized or unorganized; and if this Court refuses to follow the well-settled line of decisions of the Supreme Court of the state of Illinois because such decisions were rendered after the issue of the bonds sued on, we submit that these decisions are founded on sound reason and good law, and should be adopted as the rule of this Court.

It must be conceded that on July 21, 1886, when the vote was taken to subscribe the stock, the people of the town of Mahomet were absolutely without any authority of law to engage in the business of building railroads within or without their corporate limits. The township was not, at that time, empowered to perform any function connected with enterprises of that kind, as the Court will see by reference to so much of the township organination law herewith printed, relating to the powers of the town.

The election held July 21, 1886, *created no right and imposed no obligation.*

In the language of the Supreme Court of Illinois, it "was an idle form." The act of the people in holding the election being without authority of law, does the mere act of the supervisor and town clerk impart to these bonds the efficacy of a binding obligation upon the town? The Supreme Court of Illinois has, in the Silliman case, 61 Ill., 218, already cited, discussed and definitely settled the powers of these two officers. In discussing the power of the commissioners of East St. Louis, the Court says: "So of the supervisor and clerk. Though elected by the people, they were not elected for the purpose of creating a debt or imposing a tax, and the legislature could not clothe these two officers, without the consent of the people, with the discretionary power of taxation, or of creating a debt, because they are not by themselves the corporate authorities in the sense of the Constitution."

As to who is the corporate authority of a town under the township organization laws of Illinois, is definitely and accurately settled in the case of Williams vs. Town of Roberts, 88 Ill., 22: "But under our system of township organization there is no officer or board representing the corporate authority of the town.

The electors only represent it, and then in doing so must and do necessarily act through town meetings and town elections, and it is not pretended they may or did in the present instance bind the town in any other way. The doctrine has been announced and adhered to by this Court for a number of years, and is engrafted upon our present Constitution that the legislature can not compel a municipal corporation to incur a debt or issue its bonds for a local corporate purpose without its consent."

* * * * * * * * * * * *

Speaking of the election held in that case the Court say: "But it was not called in conformity of law, and the notice of the election was not given as the law required. Of this, it is to be presumed, the electors were cognizant, and, being advised of its illegality, it is fair to presume that many opposed to the proposition pretended to be submitted did not participate in the election, knowing they could not possibly be affected by it."

* * * * * * * * * * * *

"The corporate authority of the town (the electors) must and can only act when called together in obedience to law, and when not thus called together it is obvious any action by them can at best amount to no more than the action of a mass-meeting."

* * * * * * * * * * * *

"The act of April 17, 1869, then rests solely on the power of the legislature to create a debt against the town without the consent of its corporate authority." The Court says: "This question was fully considered and discussed in Marshall vs. Silliman, 61 Ill., 218, and Wiley et al. vs. Silliman, 62 Id., 170, and what we have said goes but little beyond a restatement of the propositions there carefully established. It is true in those cases the subscription condemned had not been authorized by the corporate authorities of the town, although an election for that purpose was claimed to have been held because no law authorized an election for that purpose; but the difference between a pretended election held to be a nullity because not authorized by any law, and one held to be a nullity because not called and held in obedience to an existing law, can surely be of no significance to

the present question. The result is, in neither was there any action of the corporate authority of the town (the electors) on the question which the law will recognize in both cases the legality of the subscription, and the issue of the bonds must rest solely upon the act which assumes to validate them."

—See Barnes vs. Town of Lacon, 84 Ill., 461.

The act of the legislature, passed on the 28th day of February, 1867, was in violation of the constitution of the state: Because the subject matter of its provision is not defined in its title and it embraces two distinct subjects.

We now desire to call the attention of the Court to the difference between the subject matter embraced in the scope and provisions of the act of February 28, 1867, and the legitimate provisions of an act such as is designated by the title of the bill. Before the passage of the law in 1867 there was no act of the legislature recognizing the corporate existence of the Danville railroad. It existed only by virtue of articles of incorporation under the general law of the state. To increase its facilities as a mere corporation, this act, as indicated by its title, was passed in February, 1867. It was not an act, judging from the title, intending to enlarge the corporate powers of *municipal* corporations, but simply to amend the charter of a *railway* company. Within the meaning of the Constitution of 1848, already quoted, it is a "private or local law." The phraseology used by the legislature, clearly designates the local or private character of the act, "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and to confer a charter upon the same." Judging from this designation of the act, no person could reasonably assume that the legislature intended, by the terms of the law that was to follow, to legalize the unauthorized act of the citizens represented by the election of July 21, 1867, so as to create against the corporate authorities of the Town of Mahomet, a legal liability of $100,000. The legislature, by the provisions of this bill, legislated for a private corporation in the amendment of its charter, and by the

same law assumed to represent the corporate authorities of the Town of Mahomet, by taking stock in a railway company.

There are involved in this law two separate and distinct subject matters, one only of which appears by the terms of the title of the act. The legislature has enlarged the responsibilities, affected the interests, and created a debt for the people of the town by virtue of the 13th section, without any reference to such a subject-matter in the terms of the title.

The case of the Village of Lockport vs. Gaylord, 61 Ill., 279, discusses this provision of the Constitution. The Court say: "But it is insisted that the act of the trustees was legalized by subsequent legislation." In 1869 the legislature passed an act entitled "An act to amend the charter of the Village of Lockport, passed Feb. 12, 1853," the 6th section of which is as follows: "That the appropriations made by the president and trustees on orders drawn by the clerk, in February, 1867, be, and the same are hereby legalized in all respects." * * * To this it is answered that the act of 1869 is violation of the following clause of Sec. 23 of Art. 3, of the Constitution: "And no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title," that the subject of the 6th section is not expressed in the title of the act. The title is appropriate to all the provisions of the first five sections of the act, as they are in reference to and amendatory of the said original act mentioned in the title."

"We do not perceive how the 6th section can be regarded as germane to the subject expressed in the title. The legalization of the unauthorized acts of the corporation cannot be considered to be amendatory of its charter. The 6th section does not profess to amend the original act of incorporation, or define the powers to be exercised by the corporation in future; its only possible effect is to benefit individuals who may happen to be the holders of the certificates mentioned. The object of this section is not expressed in the title of the act, and we must hold that it was passed in violation of the Constitution, and is therefore void. For the reasons indicated, in the view of the majority

of the Court, the judgment must be reversed and the cause remanded."

Again, this provision of the Constitution was the subject of judicial interpretation in the case of Middleport vs. Ætna Life Ins. Co., et al., 82 Ill., 565. The Court say: "The act of February, 1869, to which reference is made as conferring power upon the officers of the town to issue bonds in payment of the appropriation or donation, voted under the act of March, 1867, is 'an act to legalize certain aids heretofore voted and granted, to aid in the construction' of the proposed railroad. That is all it purports to be by its title. The Constitution of 1848, under which these acts were passed, contained a restriction that 'no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title.' This is a private or local law, and it can hardly be maintained the issuing of bonds in liquidation of appropriations voted under a prior act, is germane to the subject expressed in the title of the bill, viz.: 'To legalize certain aids heretofore voted and granted.' No such object is expressed in the title, and hence it follows, all provisions of the bill not so expressed are void.

—Lockport vs. Gaylord, 61 Ill., 276.

We can see that the amending of the articles of association of the railroad company, by extending its powers, and conferring a charter upon it, is one subject; but to the discriminating legal mind it is equally apparent, that the attempted curing of unauthorized acts of the officers of a township, and thus extending the powers of *another corporation*, in no way referred to in the title, is another and different subject.

The act of February 28, 1867, *is unconstitutional, because it attempts to create a debt for the plaintiff in error without the assent of the corporate authority of the town.*

In the case of Marshall et al., vs. Silliman et al., reported in 61st Ill., 218, it was expressly held that the legislature has no power to pass a "curative act," and that the character of a bond as a liability against the town is to be determined by

what the power of the town was at the time it sought to exercise the right, and not by what may be done afterwards, either by the legislature or some of the officers of the town. In that case, the Court will see, by an examination of the facts, that the sum of fifteen thousand dollars was voted, in addition to the $35,000 expressly authorized by the charter of the railroad company; and it being understood, as in this case, that some additional legislation was needed to supply the legal deficiency, an act was passed, in 1869, attempting to make valid the issue of the bonds representing the $15,000. In the opinion, the Court says:

"As to the vote for the $15,000, it is not claimed by counsel for appellees that it was valid at the time. The charter authorized $35,000, and only that sum, to be subscribed by the town, and the vote upon this was to be taken in a manner specially pointed out. The mode was adopted in reference to the vote for that sum. But the vote for the $15,000 was simply a vote at a special town meeting, called on the application of twelve voters, under the general township organization law, which conferred no authority whatever on the township authorities to hold this election. It was an utterly void proceeding. The town had no power to take railway stock, and issue railway bonds, independently of legislative action, and this vote could give none. The law limited the stock to $35,000. It is, however, insisted by appellees, that an act of the legislature, passed April 17th, 1869, made the election and the bonds issued thereunder valid. The act is as follows, and will be found in Vol. 3 of Private Laws of 1869, p. 372:

"'SECTION 1. [*Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That a certain election held in the township of Brimfield, in Peoria county, on the third day of August, 1868, at which a majority of the legal voters in said township, in special town meeting, voted to subscribe for and take $15,000 of the capital stock of the Dixon, Peoria, and Hannibal Railroad Company, over and above the amount authorized to be taken by the charter of said company, is hereby legalized and confirmed, and is declared to be binding

upon said township, and may be collected from said township in the same manner as if said subscription had been made under the provisions of said charter.'

"This law, if valid, had the effect of creating a debt of $15,000 against this township. It declares that the subscription is binding, and may be collected from the township in the same manner as if it had been legally made. Before the passage of this act, it was not binding, and could not be collected. If it is now binding, it became so for the first time at the passage of this law, and is so solely by the force of the law."

"The question, then, whether the subscription is binding, does not depend merely upon whether the legislature can pass a retrospective law, but upon whether it can create a debt against a town, and require the town to assess a tax for its payment."

"That this is the real question cannot be denied. It cannot be said that the town has ever consented to the creation of this debt. The so-called vote was an idle form. Persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceedings as a nullity. The vote can no more be accepted as the action of the town, or as giving the consent of the town to the creation of this debt, than would a resolution adopted by the same number of persons at one of their dwellings, or in a casual encounter at a street corner."

"Neither can the subsequent issue of the bonds, on the 5th day of May, 1869, be taken as showing the assent of the town. That was the mere ministerial act of the supervisor and clerk, performed in obedience to the act of the legislature."

"We come, then, to the question, whether the legislature can create a debt against a municipal corporation for municipal purposes, and subject it to a tax for its payment, without its consent."

"Our new Constitution expressly prohibits this for the future, and the decisions of this Court substantially hold that it could not be done under the Constitution of 1848."

"The 5th section of the 9th article of the Constitution of 1848, provides that 'the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.'"

"In Harvard vs. St. Clair & Monroe Levee Drainage Co., 51 Ill., 130, we held this cause was an implied limitation upon the power of the legislature to grant the right of corporate taxation to any but the corporate authorities." In the subsequent case of The People ex rel., etc. vs. The Mayor of Chicago, Ib., 30, we went further, and held that, although there might be cases where the legislature, without the consent of the corporate authorities, might impose taxes, local in their character, if required by the general good government of the state, because such taxes would not be for corporate purposes merely; yet the legislature could not compel a municipal corporation, against its own will, to issue bonds or incur a debt for a merely corporate purpose, like the creation of a public park, or other local improvement. In the last cited case, the precise question under consideration was fully considered, and it is unnecessary to repeat what was there said.

"See, also, Hessler vs. Drainage Com., 53 Ill., 110, and Lovingston vs. Wider, Ib., 302."

"These cases show it to be the settled doctrine of this Court, that, under the Constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our existing constitution."

"That was the effect of the curative act under consideration, and it was therefore void."

"It is said, however, by counsel for appellee, that the legislature might have authorized the town supervisor and town clerk, as the corporate authorities of the town, to subscribe to the stock of this road, and issue bonds therefor without a vote of

the people, and that the curative act is to be considered as giving them that power, which they have duly exercised." "The case of the Town of Keitsburg vs. Frick, 34 Ill., 420, is cited in support of this position."

"It was said in that case, that the legislature might grant that power to the trustees of a town, if it thought proper to do so, without taking a vote of the people. We do not dissent from that position, but it does not aid the appellees in the present case. The town supervisor and clerk, who issued these bonds, do not represent a township, as the board of trustees represent an incorporated town, or the common council represent a city. The supervisor and town clerk are but a part of the corporate authorities. They have no power of taxation, nor power, of themselves, to bind the city in any way. The case of Lovington vs. Wider, supra, may again be cited. We said there that the police commissioners were not the corporate authorities of East St. Louis, as they had not been elected by the people of the city, nor appointed in any manner to which the people had given their consent, and therefore the legislature could not give them the power of taxation, by creating a debt binding upon the city. So of the supervisor and town clerk. Though elected by the people, they were not elected for the purpose of creating a debt or imposing a tax, and the legislature could not clothe these two officers without the consent of the people, with a discretionary power of taxation or of creating a debt, because they are not, by themselves, the corporate authorities, in the sense of the constitution."

"But even if these two officers could be recognized as the corporate authorities, they can not be said to have voluntarily incurred this debt on behalf of the town. The act gave them no discretion. It declares the subscription shall be binding, and may be collected. It did not authorize the corporate authorities to subscribe to the stock or not, as they should think proper, but declared that an illegal vote should be a valid subscription, and left to the town authorities only the ministerial function of executing the behest of the legislature."

* * * * * * * * * * * *

"Our conclusion is, that *the so-called curative act was a violation of the Constitution.* Its object was to compel this town to issue its bonds for railroad stock, independently of its own wishes, and this was beyond the limits of legislative power. It sought to accomplish this by declaring that a void proceeding was a valid one; that a vote confessedly illegal was in fact legal. But this vote was an accomplished fact. Whether it was within the corporate powers of the town and binding upon its people, was a question which no subsequent legislation could affect; and when the legislature undertook to say that this vote created a valid obligation against the town, when it did not, it was attempting, by its own act, to create a corporate debt. So far as the tax was assessed for the payment of interest on the bonds for $15,000, which, we understand from the records, was a distinct issue, it should have been enjoined; and if the bonds have not been negotiated the company should be required to surrender them."

Following this case and asserting the same doctrine are the cases of Wiley et al. vs. Silliman, 62 Ill., 170; Barnes vs. Town of Lacon, 84 Ill., 461; Williams vs. Town of Roberts, 88 Ill., 11; Gaddis vs. Richland County, 92 Ill., 119.

We confidently assert that no decision of the Supreme Court of Illinois can be found holding a different doctrine. The authorities are uniform and unbroken. In connection with these cases we desire to call the attention of the Court to the case of the Town of Elmwood vs. Marcy, 2 Otto, 294, which we think is decisive of the issue involved in this case. That case was decided upon the faith and authority of the Silliman case, and especially recognizes it as embodying the correct construction of the laws and Constitution of Illinois. The Supreme Court of the United States said, in commenting on that case: "There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but, on the contrary, settled in uniformity; and as these concurring decisions of the Court of last resort in that state are grounded upon the construction of its Constitution and statutes, it is the duty of this Court to conform to them." Since the decision in the Elmwood case the Supreme Court of Illinois has adhered to and reasserted the doctrine of the Silliman case in every instance

in which the question has arisen. There is no decision in Illinois, either before or after that case, holding a different theory of the Constitution and laws. There has been no change; there is an unbroken line of uniformity; and this fact is especially recognized by the Federal and State Supreme Court. The Supreme Court of the United States, in the Elmwood case, in discussing the power of the legislature to pass a "curative" act, said :

"It is insisted, however, that the curative act of April 17, passed after the vote had been taken, gave validity to the bonds. On this ground counsel placed their chief reliance, and to it the Court directed its principal attention."

"The act was direct and positive, and left nothing to inference. It was intended, so far as the legislature could do it, to make the bonds binding on the township, and collectable in the same manner as if the subscription had been authorized by the charter, and voted for in accordance with its terms. The Court held it to be a violation of the fifth section of the ninth article of the Constitution of 1848, which declares that the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. The decision was placed on the ground, that, this section having been intended as a limitation upon the law-making power, the legislature could not grant the right of corporate taxation to any but the corporate authorities, nor coerce a municipality to incur a debt by the issue of its bonds. In the opinion of the Court, the act was an effort to do both these things, as it attempted to confer that right upon persons who were not by themselves the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock by declaring a void proceeding to be a valid subscription."

—Township of Elmwood vs. Marcy, 2 Otto, 292.

The "curative act" in the Silliman case "was intended so far as the legislature could do it, to make the bonds binding on the town," and in this case the "curative act," passed on the 28th of February, 1867, seeks to make binding on the town, the

election held July 21, 1866, and the ministerial act of the supervisor and town clerk, in the execution and delivery of the bonds in controversy. The Supreme Court of Illinois, and the Supreme Court of the United States, following that decision, have decided that under the Constitution of the state the legislature had no right to pass a curative statute. Without the curative statute, there can be no pretended right of recovery in this case. No reason can now be found for reversing these cases, by denying the sound philosophy upon which these adjudications are based. If there is any one question settled by the Supreme Court of Illinois, without qualification or exception, it is, that the legislature, under the Constitution of 1848, had no right to pass a "curative act," making good the void action of a town, in the creation of a debt. It was insisted in the argument in the Circuit Court, that the case of The President and Trustees of the Town of Keithsburg vs. Frick, 34 Ill., 405, and the case of St. Joseph Township vs. Rogers, 16 Wallace, 666, hold a different doctrine. The Court will find, by an examination of the Illinois cases, that under the laws and Constitution of Illinois there is a difference between the cities, villages, and towns, and townships.

In speaking of municipal corporations generally, there seems to be a proneness to treat townships, cities, and villages as similar in all respects. No greater error, in law or reason, could possibly be committed. Let us look for a moment into the organization and systems of these local governments in Illinois.

Prior to the adoption of township organization in this state, we had what was called election precincts—generally each congressional township composed a precinct. No corporate powers of any kind were ever attempted to be conferred upon the precinct or the inhabitants thereof. All the affairs of the precinct were transacted by *county* officers. It was simply a division of the county for the convenience of the inhabitants for the purposes of elections.

In 1845 the legislature passed an act authorizing *counties* to adopt what is now called township organizations, being an act which conferred certain limited powers upon the *electors* of those old precincts. The original act, with some unimportant changes,

is the law governing townships, in a general way, in force at the present time.

The mode of testing the question as to whether the act should be adopted was, and is to-day, by submitting it to the legal voters of the *county*. If a majority of the legal voters of the *county* voted in favor of its adoption, the *county* became so organized.

It was not left to the legal voters of each *precinct* to choose for *itself* whether or not it would assume corporate powers.

R. S. Ill., (1874) p. 1066, sec. 1, *et seq.* All the legal voters of one precinct might have voted unanimously "against township organization," and yet if a majority of the votes of the county favored the proposition, that precinct, not only without its consent, but against its positive unanimous *protest*, would have corporate powers *thrust* upon it. The petition of fifty legal voters in a populous city of the county, could, and and can, by petition, start the machinery of law in motion to produce that result.

By this township, or organization act, the legislature, while clothing those precincts with certain additional powers, left the exercise of those powers entirely with the electors as an aggregate body, who alone are the corporate authorities.

Take the case of city or village (town as it is sometimes called). They *ask* for corporate powers. They never become incorporated without their consent. The legislature does not, as in the case of townships, say to the inhabitants of one city or village, "You shall assume corporate powers if the other cities and villages in the county so order." But that is left entirely in the discretion of the inhabitants of the city or village.

—R. S. Ill., (1874) p. 211, sec. 1, *et seq*:

Prior to the adoption of the Constitution of Illinois, of 1870, cities, like railroad companies, could have *special* charters conferred upon them, but they, of course, were under no obligation to accept the charter. They always had their option to accept or reject it. If they accept of the privileges which the charter

confers, they, of course, cannot escape the burdens which it imposes. If they *ask* for privileges, they, of course, must be charged with the responsibility of a proper exercise of those privileges. And herein is found the distinction between the two classes of corporations referred to.

To illustrate: A city *asks* to have a charter conferred upon it that will enable it to provide the means of building and keeping in repair good and safe bridges across streams within its boundaries. As soon as it receives and accepts of the same, the law attaches to it the responsibility of erecting and maintaining them, and will hold it answerable in damages to any person injured by its negligence in this regard.

Not so with a township. It did *not ask* or consent to the conferring of corporate powers of any kind upon it, and it did not, therefore, incur any such responsibility. White et. al. vs. County of Bond, 58 Ill., p. 297; Town of Waltham vs. Kemper, 55 Ill., p. 347, and authorities cited. And it is for that reason that none of the common law liabilities of corporations generally attach to a township of Illinois.

The corporate powers of a city or village are exercised by the common council, or a board of trustees, elected for that purpose. While in the case of a township, what few corporate powers they have can be exercised by the electors only.

The case of Keithsburg vs. Frick, 34 Ill., 405, serves only to further illustrate the doctrine for which we have been contending. In that case an election had been held while the village was acting under its old organization, and the Court does not determine whether or not it had the power to hold the election at the time, but it afterwards had a special charter conferred upon it in and by which it was made the duty of the *corparate authorities* to issue the bonds previously voted. The village, in the exercise of its option, *accepted* this charter. One condition of this acceptance was the issuance of the bonds. It would be idle to contend that it could accept of the privileges which the charter conferred upon it, and at the same time reject its burdens.

nor power of themselves, to bind the city in any way." Recuring again to Williams vs. Town of Roberts, 88 Ill., 23, as to who is the corporate authority, "The corporate authority of the town (the electors) must and can only act when called together. It is obvious any action by them can at best amount to no more than the action of a town meeting. The supervisor and town clerk, neither separately nor associately, are the corporate authority of the town."

The litigation in the Keithsburg case, simply determined questions in relation to the power of the president and trustees of an incorporated village, the litigation in the Silliman and all subsequent cases, determined questions of power, as applicable to a town or township; and the right of the legislature to supply the defects of corporate action where there is an absolute want of power.

The Supreme Court of Illinois, in the construction of the laws and constitution, has distinguished a difference between the corporate authority of a city council of a city, the president and trustees of an incorporated village or town, and the corporate authority of a township. This case simply involves a construction of the laws and constitution—a construction has been given by the highest court of the state. The learned judge said in the Elmwood case: "We have always followed the highest court of the state in its construction of its own constitution and laws. It is only when they have been constructed differently at different times that, in cases like this, we have adopted as a rule of action the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court; but, where the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue. There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but, on the contrary, settled uniformity. As these concurring decisions of the court of last resort in that state are grounded on the construction of its constitution and statutes, it is the duty of this court to conform to them."

We now call the attention of the Court to the "St. Joseph case," decided in 16 Wallace, 644. It will be found on examination of that case, that the constitutionality of the act of February 28, 1867, was not distinctly made. It is not argued in the brief of counsel, upon the theory that it was beyond the power of the legislature to pass such an act. The learned judge said: "Objection is made to the preliminary proceedings because the election approving the subscription was held before the act was passed, giving such authority to such municipalities, but two answers are made to that objection, either of which is decisive:

1. By the act conferring that authority it is provided that where elections may have already been held, and a majority of the legal voters of the township were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in the act is provided; and the provision is that such elections are legal and valid as if the act had been in force at the time thereof, and that all provisions had been fulfilled."

—St. Joseph township vs. Rogers, 16 Wallace, 660.

2. Because the legislature passed a subsequent act declaring such subscription legal and obligatory.

The Circuit Court, in the trial of the St. Joseph case, gave two instructions:

1. "The election held in August, 1866, as declared in the evidence, was validated by the act of February 28, 1867, so as to authorize the defendant to subscribe for stock in the Danville, Urbana, Bloomington & Pekin Railroad, and to issue the bonds in question; and when the stock was subscribed and the bonds issued, the bonds are binding on the defendant in the hands of a bona fide holder."

2. "The recitals in the bond stop the defendant from denying the fact of a valid election as against a bona fide holder of the bonds or coupons attached thereto."

The argument of counsel for the appellant is mainly devoted to prove that the bonds were not issued in accordance with the requirements of the act of February, 1867, and not that the

The charter was offered to it conditionally. Could they accept it and refuse to comply with the conditions of that acceptance? Clearly not. The acceptance of the charter and enacting of an ordinance under it requiring the bonds to be issued, gave the full consent of the corporate authorities to the creation of the debt. The above is really all that the case *decides*. The judgment of the Court below was *affirmed*.

Any other remarks were unnecessary in the decision of the case. But there is nothing in the opinion in that case that in the least militates against the rights of the plaintiff in error in the case at bar. The cases are essentially different. The rights, duties, privileges, purposes, powers and responsibilities of the two corporations differ as widely as day and night. The machinery, so to speak, by which their different powers are executed, are equally different. In the one case the powers of taxation and all the business affairs of the corporation are executed and transacted by a board of trustees elected for that purpose, while in the other all the powers of the corporation are reserved to the *electors*, when legally assembled as an aggregate body. The officers of one corporation are both executive and legislative, while those of the other are simply ministerial.

That old act of congress which says that the decisions of the courts of last resort in a state construing the Constitution of the state, and the statutes enacted in pursuance thereof, shall be adopted as the rule of decision by the federal courts, was founded, in part at least, upon the reasonable presumption that the Supreme Court of the state is more familiar with the internal machinery and workings of the state government, than are the federal courts. We then turn to the decisions of the Supreme Court of Illinois, and find the above distinctions between these corporations clearly marked, though, perhaps, not quite so tediously as we have done.

That Court has so frequently been called upon to adjudicate these questions, and its decisions being so uniform, they have long since become the accepted and settled law of the state.

Keithsburg was an incorporated village first under the act of 1849, and then by special charter under the act of 1857. As a

municipal corporation it was represented directly by the president and trustees, and they are the corporate authority, and as such must have full power to bind the corporation as to all acts and matters falling within the scope of the corporate purpose. The Court said (Keithsburg vs. Frick):

"However it may be as to the powers of the corporation of Keithsburg, under the act of 1849, it is, perhaps, not important to inquire, as these bonds were issued under the act of 1857, to incorporate the town. It is under a special charter which authorized the president and trustees to subscribe for and take stock to an amount not exceeding twenty thousand dollars, and to issue the bonds of the corporation in payment therefor, to run for a term not exceeding twenty years, to draw interest not exceeding ten per cent per annum, payable semi-annually, and to do all things in relation thereto as natural persons.

—Sess. Laws, private acts, 1857, Sec. 2, p. 868.

"There was no necessity to submit the question to the legal voters, as the act grants the power expressly to the president and trustees, the act having been accepted by the corporation as their charter."

It will be seen that the Court predicates the legality of the bonds upon the distinct ground that the act granted the power "expressly to the president and trustees" "to subscribe for the stock and issue bonds of the corporation in payment therefor." The Supreme Court, in the Silliman case, referred to the Keithsburg case, and distinguished it from the Silliman case, and in effect from all subsequent cases following the same line of authority. "It was said in that case (Keithburg vs. Frick) that the legislature might grant their power to the trustees of a town, if it thought proper to do so, without taking a vote of the people. We do not dissent from that position, but it does not aid the appellees in the present case. The town supervisor and clerk who issued these bonds do not represent a township, as the board of trustees represent an incorporated town, or the common council represent a city. The supervisor and town clerk are but a part of the corporate authorities. They have no power of taxation,

act itself was unconstitutional. It was insisted in that case that false recitals of past facts did not estop the corporation. It is no disrespect to the Court to say that it is not a well considered case upon the question which we now make. But conceding for the "St. Joseph case," all that may be claimed by counsel for it as an authority in this controversy, it has been overruled and superseded by the later and better considered decision of Elmwood vs. Marcy, 2 Otto., 289. It is not the law of Illinois in the light of the local decisions of that state, nor the law of this Court in the light of the subsequent adjudications. Examined by the criticism of the adverse decisions in Illinois, it loses its force both as law and logic.

Counsel for appellee, in the former argument, referred with great confidence to Cowgill vs. Long, 15 Ill., 202. In the Silliman case it was insisted that the doctrine of the 15th Illinois saved the constitutionality of the statute passed upon in the 61st Illinois. But the Court said:

"There is, however, a broad distinction. The tax, in that case, was a valid tax, and when the Court says, in its opinion, that it was improperly voted in July, they evidently mean that it was improperly voted in that month, for the purpose of collection during the current year. The tax was legally imposed, and the only question decided by the Court was, that the subsequent act of the legislature legalizing the step by which the tax was illegally certified to the County Court and placed in the course of collection during that year, was so far effectual that the tax could be collected by virtue of the act. The act dealt with a subject entirely under the control of the legislature, namely, the subject of remedy. The question before the Court was very different from the ratification of a void tax by retrospective legislation. which the legislature could not, of its own power, impose prospectively."

—Marshall vs. Silliman, 61st Ill., 226.

It is sought to be maintained that the doctrine of the 15th and 34th Illinois, upon the subject of curative legislation, is different from the doctrine announced in the 61st Illinois and the

subsequent cases, and therefore this case falls within the decision of Gilpecke vs. Dubuque, 1 Wallace, 206.

Against this position of counsel we call the attention of your honors to what has been said, both by State and Federal Courts, on the question of uniformity of doctrine.

"There has been no change," is stated by the Supreme Court of Illinois, and reiterated by the Supreme Court of the United States in the cases cited by appellants. The distinction between the corporate authorities of cities, villages, and townships, made by the Supreme Court, in the case when that question first arose, is a distinction founded upon a substantial difference. The Supreme Court of Illinois could not pass upon the question of a curative statute in relation to a township until it arose in a proper case; and the very first case where that question did arise, the Court passed on it as we have argued, and has steadily adhered to the principle of the first case in every subsequent adjudication. Counsel think the Court, by way of protecting their bonds, should have decided that a city, village and town were the same. This might have preserved the rights of appellees, but its consequences would have disturbed the harmony of the whole system of township organization. It is for the Supreme Court of the state to preserve the Constitution and laws so far as the same relate to the local jurisdiction and government of the state, and its decisions will be followed, where they are uniform and not in violation of some well established principle of commercial law. Nobody acting upon the faith of an Illinois decision could have been misled in the sale or purchase of these bonds. Up to the case in the 61st, the discussion and controversy had been in relation to different corporations; and the person who was misled by any assumed analogy between a city, village and township, simply mistook the law.

The 13th section of the act of 1867, leaves no discretion in the minds of the officers of the town as to their duty, in making the subscription where a vote had been had. The language is: "And the amount, if voted for, shall be subscribed as in this act provided." If a proceeding by mandamus

has been commenced against the officers of the town to compel the execution of the power and the performance of the duty, so clearly recognized by the terms of this law, could it be successfully maintained that they had any discretion, if the requirements of the law in other respects had been fulfilled? The act assumes to make it the duty of the officers of the town to issue bonds where elections have already been had, as well as where elections were held after the passage of the law, and the right of the railroad to the bonds in either case is the same. If the officers have a right to disregard an election held before the passage of the law, they have an equal right to disregard an election held after, and counsel will certainly not contend that the supervisor and town clerk, mere ministerial officers, could, by the exercise of a capricious discretion, defeat the purpose of both the railroad company and the people of the town. Such a construction involves an absurdity. Counsel have attempted to show, by the Illinois decisions, that "may" and "shall" may be used interchangably. That "shall" will mean "shall" when they are seeking to get a bond, and when they are trying to collect it it means "may." This is the substance of the position. The context shows the intention of the legislature. The precise question now before this Court came before your honors on appeal from the southern district of Illinois, in which the Circuit Court held the bonds in suit to be null and void; and that decision was affirmed by this Court, in a divided Court.

—Leslie vs. Town of Urbana, and other cases.

In the case of County of Jasper vs. Ballon, 13th Otto, 745 (cited by appellees), the Court was dealing with the municipal power of a county, represented by the board of supervisors. But the Supreme Court of Illinois, as we have said, recognizes a substantial difference between a county and a township. "County boards, such as board of supervisors, commissioners, etc., and the municipal authorities of incorporated cities, towns, and villages, may, when empowered to do so by proper legislation, subscribe for the capital stock of railroad companies without submitting the question to the electors of the municipality."

—Williams vs. Town of Roberts, 88 Ill., 21.

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"But under our system of township organization there is no officer or board representing the corporate authorities of the town. The electors only represent it, and they in doing so must, and do necessarily, act through town meetings or town elections."

In conclusion, we submit that the decisions in Illinois are uniform and unbroken against the authority to pass the act of 1867, that this court has followed those decisions in the cases we have cited, and that therefore the judgment of the Court below should be reversed.

JOHN McNULTA.
R. A. LEMON.

117-508

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Supreme Court United States.

OCTOBER TERM, 1885.

NO. 145.

TOWN OF MAHOMET,

Plaintiff in Error.

vs.

JOHN M. QUACKENBUSH.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN MCNULTA,
R. A. LEMON,
Attorneys for Plaintiff in Error.

JOHN J. WEED, *of Counsel.*

R. O. POLKINHORN, Printer.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

THE TOWN OF MAHOMET,
Plaintiff in Error,
vs.
JOHN N. QUACKENBUSH.
No. 145.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant in error instituted his suit in the United States Circuit C ourt for the Southern District of Illinois on the 13th day of May, 1882, to recover from the plaintiff in error the principal and interest of forty-three bonds for the sum of one hundred dollars each, alleged to have been issued by the township of Middletown in pursuance of the laws of the State of Illinois, and the vote ot the people of that town had at an election held July 21, 1866.

On the 22d May, 1882, the defendant in error filed in said Court his declaration, wherein he claimed the sum of seven thousand dollars based upon the said bonds, a copy of which

was attached to the said declaration, and is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *State of Illinois:*

No. 1. Middletown Township Railroad Bond. $100.

Know all men by these presents, that the township of Middletown, in the county of Champaign and State of Illinois, acknowledges itself to owe and be indebted in the sum of one hundred dollars, lawful money of the United States of America, which sum of money the said township of Middletown promises to pay to the order of ———, at the office of the county treasurer of said county, on the first day of October, in the year one thousand eight hundred and seventy-seven, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of October in each year, at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of the said principal sum.

This bond is issued under and by virtue of a law of the State of Illinois, entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held July 21st, 1866, in accordance with said act; and the faith of the township of Middletown is hereby pledged for the payment of the said principal sum and interest as aforesaid.

In witness whereof the supervisor and clerk of said township of Middletown have subscribed this bond, this first day of October, one thousand eight hundred and sixty-seven.

J. E. COX, *Clerk.*

WASHINGTON NEBEKER, *Supervisor.*

The remaining bonds sued on this case are fac-similes of the above bond, number one, except as to their numbers, which are as follows, to wit: Numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65. (Record, pp. 4, 5.)

Said declaration also contained the usual money counts.

On the 7th day of June, 1882, the said plaintiff in error, filed a demurrer to the said special count of said declaration, and a plea of the general issue to the common counts thereof.

On the 20th of June, 1882, the said suit was heard upon the demurrer to the said declaration, and after argument of counsel thereon the same was overruled, and thereupon the said Court rendered a judgment in favor of the defendant in error against the plaintiff in error, in the sum of five thousand eight hundred and ninety-nine dollars and thirty-four cents.

The plaintiff in the said suit, in order to maintain the issues on his part, offered in evidence the originals of the bonds, a copy of which is recited above, and further proved at the time the said bonds and coupons were issued the said town of Middleport, by its supervisor, subscribed for an equal amount in the shares of stock in the "Danville, Urbana, Bloomington and Pekin Railroad Company," and that the said shares were delivered to the said town of Middleport, and are still retained by it. And further offered evidence to show that the said town had paid the interest on said bonds for ten years, without objection.

The defendant, at the trial, offered to return to the plaintiff the stock received by it from said railroad company. Upon the said trial the following questions arose and occurred, to wit:

1st. Was there any law in force in the State of Illinois on the 21st day of July, 1866, authorizing said township to vote upon the question of issuing these bonds or authorizing their issue?

2d. Whether under the constitution of Illinois of 1848 the Legislature had the power to pass the act referred to in the bonds in evidence so as to legalize the election of July 21st, 1866?

3d. Whether the special election of July 21st, 1866, in the absence of any statute authorizing such election, was

legal and valid when such election was held, or was made legal and valid by virtue of the act of the Legislature of 1867, referred to in said bond?

4th. Did the vote or special election aforesaid create a legal liability against the defendant by virtue of the act of Feb'y 28th, 1867?

5th. Did the corporate authorities of the defendant authorize the creation of the debt and the issue of the bonds in evidence?

6th. Had the Legislature the power to enact the curative or retrospective provision in said act so as to make legal and valid said special election held before said act was passed, and in the absence of any law authorizing township to subscribe to the capital stock of said railroad company, and to issue its bonds therefor?

7th. Does the act of February 28th, 1867, make the bonds binding on the township as if the subscription had been authorized by law and voted for after the act had been passed?

8th. Whether any cause of action is established in law against the defendant upon the evidence in the case. Rec. pp., 8, 9.

Upon the above questions the judges of the Circuit Court and the District Court, were divided, and thereupon the facts found and admitted on the trial, and the said several questions upon which their opinions were divided, according to the statute in such cases made and provided, were certified to this Court.

Assignment of Errors.

First. This the said Circuit Court erred in overruling the defendant's demurrer to the special count of the plaintiff's declaration.

Second. The said Court erred in rendering judgment in favor of the defendant in error against the plaintiff in error for the said sum of five thousand eight hundred and ninety-nine dollars and thirty-four cents.

Third. The said Court erred in holding that the act of the Legislature of the State of Illinois, of February 28, 1867, was valid, and authorized the issue of the said bonds under and by virtue of the special election held for that purpose on the 21st day of July, 1866.

Fourth. The said Court erred in holding that the corporate authorities of the defendant township, authorized or consented to the creation of said debt and the issuing of the said bonds, or that such alleged bonds are the obligations of the defendant township.

Fifth. The said Court erred in holding that the said bonds were valid and binding, or that they were bonds of the defendant township, in the absence of any law authorizing the defendant township to vote, take stock or issue bonds therefor at the time that said special election was held on the 21st day of July, 1866, and that the legislature had the power to afterwards legalize such void election.

Sixth. The said Court erred in holding that the act of February 28, 1867, made the said bonds binding on the defendant township, the same as though the subscription had been authorized by law, and voted for after the same had been enacted.

Seventh. The said Court erred in holding that any and all of the facts averred as occurring subsequently to the issuing of said bonds amount, in law, to a ratification by the defendant township, or estop it from denying the validity of the alleged bonds.

Eighth. The said Court erred in deciding that the said act of the 28th of February, 1867, was a valid and constitutional law under the constitution of the State of Illinois.

Ninth. The said Court erred in refusing to follow the decisions of the Supreme Court of the State of Illinois upon the constitutionality of such statutes.

Tenth. The said Court erred in deciding that the defendant in error could maintain his action on said bonds, because they are bonds issued by the Township of Middlesex, and not the bonds of the Town of Mahomet, and there was no evidence in the record proving, or tending to prove, any undertaking on the part of the town of Mahomet to assume and pay said bonds.

In order that the Court may have again brought to its attention the exact questions which are presented by this record (although some of them have in previous cases been matters of discussion here), it is not out of place to submit the following preliminary statement:

First. The plaintiff in error is a corporation under the constitution and laws of the State of Illinois, organized for the purpose of local government, with certain powers limited to certain specific things, and to be exercised in definite ways and forms.

In the year 1860 a railroad company, *under articles of association*, proposed to build a railroad through the territory embraced in the jurisdiction of the plaintiff in error.

Second. In pursuance of that purpose, a pretended election was held by the people of the township on the 21st of July, 1866, at which election it is alleged that it was decided to issue fifty thousand dollars of the bonds of the township of Middletown to aid in the construction of said railroad. The said vote was alleged to be in favor of issuing the bonds to the railroad company above named.

Third. At the time said election was held there was no general or special law authorizing such an election, or such

a subscription by the township. No other election was held in said township on the subject of the subscription to said company. On the 28th of February, 1867, the legislature passed an act entitled "An Act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers and to confer charter on the same." (Private Laws of Illinois, 1867, Vol. 2, p. 758.) The whole of said act has been heretofore printed and brought to the attention of the Court in the case of the township of Urbana, plaintiff in error, *vs.* Matthew M. Bolles; and also in the case of the Town of Santa Anna *vs.* Anderson, decided by this Court at the present term.

Fourth. In October, 1867, the Supervison and Town Clerk executed the bonds in controversy, and delivered the same to the said railroad company.

Fifth. It is recited in each of said bonds as follows:

"This bond is issued under and by virtue of a law of the State of Illinois entitled, 'An Act to amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend its powers and to confer a charter on the same, approved February 28, 1867,' and in accordance with the vote of the electors of said township at the special election held on the 21st of July, 1866, in accordance with said act."

Brief.

First. At the time these bonds were voted, on the 21st day of July, 1866, there was no law, either general or special, authorizing a township to hold an election and vote a subscription to a railroad company.

Second. There was not only no law authorizing such an election and subscription, but the township organization

law then in force, by necessary implication, prohibited the exercise of such a power on the part of the town. "No town shall possess or exercise any corporate powers except such as are enumerated in this act, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted.) (Gross, Ill. Statutes of 1868, p. 738, Sec. 2, Art. 2.)

Third. The election held on the 21st day of July, 1866, was an idle form. Persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceeding as a nullity. The vote can no more be accepted as the action of the town, or as giving the consent of the town to the creation of this debt, than would a resolution adopted by the same number of persons at one of their dwellings, or in a casual encounter at a street corner. *Marshall et al.* vs. *Silliman et al.*, 61 Ill., 224.

Fourth. The act of the Legislature, passed on the 28th of February, 1862, was in violation of the Constitution of the State, because the subject matter of its provisions is not expressed in its title, *and it embraces two distinct subjects of legislation.* The Constitution of 1848, in force in 1866, provides:

"And no *private* or *local law*, which may be passed by the General Assembly, shall embrace more than one subject, and that shall be expressed in the title."

Constitution of 1848, Gross' Rev. Stat. 1868, p. 19, part of Sec, 23 of Art. 3d.

Middleport vs. *Ætna Life Insurance Company et al.*, 32 Ill., 565.

President and Trustees of Lockport vs. *Gaylord*, 61 Ill., 276.

Fifth. The act of February 28, 1867, is unconstitutional, because, it attempts to create a debt for the plaintiff in error, without the assent of the corporate authority of the town. From the many authorities on this point we cite the following as the most conclusive:

Town of Elmwood vs. *Marcy*, 2, Otto, 294.
Marshall vs. *Silliman*, 61 Ill., 219.
Gaddis vs. *Richland County*, 92 Ill., 119.
Ryan vs. *Lynch*, 68 Ill., 161.
Schaeffer et al. vs. *Bonham et al.*, 95 Ill., 368.

Sixth. Without the assent of the corporate authority of the town to the issuing of these bonds, there can be no legal obligation created by them.

The *electors*, without authority of law, are not the corporate authorities; nor are the supervisor and town clerk the corporate authority.

A. The Election held on the 21st of July, 1866, created no right and imposed no obligation.

The Supreme Court of the State of Illinois has settled this question. They have declared that such an election so held was only an idle form. This emphatic language was used in the Supreme Court of that State in the case of *Marshall* vs. *Silliman*, (61 Ill. 219) above cited. It did not confer upon the supervisor and clerk any authority to issue the bonds in controversy.

In the case of *Williams* vs. *Town* of Roberts, 88 Ill. 22, the authority of these officers is clearly defined. The following emphatic language settles this question beyond all controversy or possibility of contention. The language of the Court in that case is as follows:

"But under our system of township organization there is no officer or board representing the corporate authority of

the town. The *electors* only represent it, and they in doing so must, and do necessarily act through town meetings, and town elections, and it is not pretended that they may or did in the present instance, bind the town in any other way. The doctrine has been announced and adhered to by this Court for a number of years, and is engrafted upon our present constitution, that the legislature cannot compel a municipal corporation to incur a debt or issue its bonds for a local corporate purpose without its consent."

The Court in this opinion refer to this question as being fully considered, discussed and settled in *Marshall* vs. *Silliman, supra Wiley et al* vs. *Silliman*, 62 Ill., 170; and *Barnes* vs. *the Town of Lacon*, 84 Ill., 461.

B. The act of the Legislature, passed on the 28th day of Febuary 1867, was in violation of the constitution of the State: because the subject matter of its purpose is not expressed in its title, and it embraces two separate and distinct subjects of legislation.

It is important that the attention of the Court should be called to the difference between the subject matter embraced in the scope and provisions of the act of February 28, 1867, and the legitimate provisions of an act such as is expressed by the title of the act itself. Previous to the passage of the Act of 1867, there was no act of the legislature recognizing the corporate existence of this railroad company. It existed only by virtue of articles of incorporation under the general laws of the State. To increase its facilities *as a mere corporation*, this act, as indicated by its title, was passed in February, 1867. It was not an act, judging from the title, intended to enlarge the corporate powers of municipal corporations, but simply an act to amend the charter of a railroad company. Within the meaning of the Constitution of 1848, this was *a private or local law*. The phrase-

ology used by the legislature clearly designates the local or private character of the act. Its title is "an act to amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of, and to confer a charter upon the same."

It is obvious that no person could reasonably assume that the Legislature intended, by the terms of the law, that was to follow, *to legalize the unauthorized act of the citizens represented by the election held on the 21st of July, 1866*, so as to create against the corporate authorities of the town of Middletown a legal liability for the payment of the bonds in controversy.

The Legislature, by the provisions of this act, legislated for a private corporation *in the amendment of its charter*, and by the same law assumed to represent the corporate authorities of the town of Middleport for the purpose of taking stock in a railroad company, and issue its bonds therefor.

It is clear that there are involved in this law two separate and distinct subjects matters one only of which is expressed by the terms of the title of the act. The Legislature has enlarged the responsibilities, affected the interests, and created a debt for the people of the town by virtue of the 13th section, without any reference to such a subject matter in the terms of the title.

This question has been so fully discussed in the following cases, that there seems to be no occasion for a repetition of the argument by which, so far as the decisions of the Supreme Court of the State of Illinois are concerned, there is any room for further controversy in regard to it.

It is to be observed that the invalidity of this law rests upon two objections:

First. That it assumes to legalize that which was previously unauthorized and void.

Second. That it attempts to accomplish this result by a statute which violates the express prohibitions of the constitution of the State of Illinois above quoted, because the act does not express in its title the purposes of the statute, and contains two separate and distinct subjects of legislation.

Now, it is obvious that this statute is void, irrespective of the question of the power of the legislature to legalize an antecedent, unauthorized, or illegal act, or to make valid an election which, but for the existence of this statute, would have been illegal and void.

This question, therefore, is to be determined with reference to its violation of that provision of the organic law of the State of Illinois which prohibits the passage of any law which does not aptly express in its title the object and purpose of the law. And further, that it is *a law of such private and local character*, as to be within that prohibition of the constitution which denies to the legislature the power to pass any law having a double object or purpose.

This is the settled law of the State of Illinois, which is evidenced in the following cases:

Village of Lockport vs. *Gaylord*, 61 Ill., 279;
Middleport vs. *The Aetna Life Insurance Company*, 82 Ill., 565.

It was the settled law of the Supreme Court of that State, as declared in the first of these cases, when the act under consideration was passed. It was the settled law of the State of Illinois as expressed in that case, and has so continued from that time until now; it was the settled law of that State, when the bonds in controversy were issued, and when the defendant in error acquised his title to said bonds.

C. The act of February 28, 1867, is unconstitutional and void, because it attempted to create a debt for the plaintiff in error, without the assent of the corporate authority of the town.

It is settled in many adjudged cases in the State of Illinois, where this power has been expressly drawn in question, that this power does not exist, nor can it be conferred by the passage of any supplementary or curative statutes which may be passed by the Legislature for the purpose of securing the validity of such legislation. *Marshall et al.* vs. *Silliman et al., supra*; *Harvard* vs. *St. Clare*, and *Monroe Drainage Company*, 51 Ill., 130; *The People* vs. *The Mayor of Chicago*, 51 Ill., 30; *Hesler* vs. *Drainage Commissioners*, 53 Ill., 110; *Lovington* vs. *Wider*, 53 Ill., 302.

These cases show that it is the settled doctrine of the Supreme Court of the State of Illinois, that under the Constitution of 1848 the Legislature cannot compel a municipal corporation to incur a debt for merely local purposes against its own wishes, and this doctrine, as already remarked, has received the sanction of an express enactment into the present Constitution of that State.

This Court, in the case of *The Town of Elmwood* vs. *Marcy* (2 Otto, 294), review these cases, and adopt their conclusions as being the law for this Court, and in coming to that conclusion Mr. Justice DAVIS, in delivering the opinion of the Court, at page 294, said:

"We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it some of my brethren who agreed with this opinion might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the lasw which authorize their issue were in violation of a peculiar provision of the Con-

stitution of Illinois. We have always followed the highest Court of the State in its construction of its own Constitution and laws. It is only where they have been construed differently at different times, that, in cases like this, we have adopted as a rule of action the first decision and rejected the last. This has been done on the ground that rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the Court; but, where the construction has been fixed by an unbroken series of decisions, the Courts of the United States accept and apply it in cases before them."

In conclusion the Court said:

"There has been no conflict of judicial opinion in Illinois on the controlling question in this case, but, on the contrary, settled uniformity. As the concurring decisions of the Court of last resort in that State are grounded on the construction of its constitution and statutes, it is the duty of this Court to conform to that."

But it is assumed that the case of *St. Joseph Township* vs. *Rogers*, 16 Wall., 160, and the case of the *Township of Santa Anna* vs. *Anderson*, decided at the present term are in conflict with the above decision of this Court in the case of Elmwood, from which the above quotation is made.

It will be observed that the particular point in regard to the constitutionality of the Act of February 28, 1867, now specially urged, does not seem to have been urged or considered, or presented to the Court in either of these cases. An examination of this act will demonstrate that it is in violation of the constitution of the State of Illinois as declared in the case of *Lockport* vs. *Gaylord*, 61 Ill., 276. And it is immaterial, therefore, in view of the constitutional infirmity which is to be found in that statute, whether or not the legislature of that State could, by appropriate legislation, passed expressly for that purpose, ratify an illegal act,

or authorize a subscription to the stock of a railroad company, and the issuance of bonds in payment of that stock by a township, and thereby make the same valid.

So far as that question is concerned, there has been entire uniformity in the decisions of the Supreme Court of the State of Illinois. And while, therefore, this court is correct in its conclusions that were there are different decisions upon a particular question in the judicial decisions of a State, and those decisions are so conflicting as to be impossible of harmonious construction, then this court will disregard these decisions, and decide the questions submitted without reference to them, and upon those general principles by which the decisions of this court in determining questions of private and public right are always regulated and controlled. The position for which we here contend is not at all in conflict with the proposition asserted by this court in the case of *The Town of Santa Anna* vs. *Anderson*, because that case proceeded upon the assumption that where private rights had accrued and become complete under the existing legislation of a State, or under the existing decisions of the Supreme Court of a State, no change of the law or of the decisions could effect those rights which had been acquired and had become vested under the authority of those laws and decisions.

The question here submitted for consideration is not concluded by that decision, because we now specially invite attention to a provision of the constitution of Illinois which made this statute under the authority of which these bonds were issued, absolutely unconstitutional and void; and it is not pretended that any statute passed since that date has cured or made effective this unconstitutional statute. It stands on the statute book to-day containing within it the vice which the constitution denounces of having been passed without disclosing its object and purpose in its title, and containing within its provisions two separate and distinct

objects. In a private and local statute the constitution of Illinois does not permit this to be done. For this reason, if no other existed, this statute should be held void.

First. Because it is in violation of the constitution of the State of Illinois; and

Second. Because such statutes have, in all the decisions of the Supreme Court of that State, been declared to be without constitutional authority.

This Court, as it has often and repeatedly declared, will follow the adjudications of the highest tribunal of the State in the interpretation of its own constitution and laws; and if that rule of decision is adhered to in the case under consideration, then it necessarily follows that the judgment of the Circuit Court should be reversed, and the said act of the Legislature of Illinois, under which the bonds in controversy were issued, should be held unconstitutional and void for other and different reasons than were considered by this Court in the case of the Town of Santa Anna, decided at the present term.

A more elaborate discussion of these questions will be found in an argument filed in the case of the *Township of Urbana* vs. *Bolles*, No. 909, at the October term of this Court for 1882, and to that argument we respectfully beg leave to refer.

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JOHN J. WEED,
Of Counsel.

Appendix.

"The following are the material provisions of the act of February 28th, 1867:

SEC. 9. Counties, cities, towns or townships through which said (road) is to pass or along the route thereof *which have held* or shall hold elections upon the question of subscribing to the capital stock of said company, *as by this act*, or by any general law of this State, required or permitted, shall, upon any such election being held or carried in favor of so subscribing, adopt the subscription of such county, city, town or township, now made to said capital stock, under said articles of association, or a part of their subscription; and upon the issue of stock by said counties, cities, towns or townships, such citizens shall, by the board of directors, be released from individual liability therefor.

* * * * * * * * *

SEC. 12. To further aid in the construction of said road by said company, any incorporated town or township, in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding Two Hundred Thousand Dollars.

SEC. 13. No such subscription shall be made until the question has been submitted to the legal voters in such corporation, town or township in which the subscription is proposed to be made; and the clerk of each of said towns or townships, as hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and tax payers of such town or township for which he is clerk, and in which petition the amount proposed to be submitted shall be stated, to post up notices in at least three public places in each town or township; and notices shall be posted not less than thirty days before the day of holding of such election, notifying the legal voters of such town or township to meet at the usual places of holding elections

in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription. PROVIDED, *that when elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then, and in that case no other election need be held;* AND THE AMOUNT SO VOTED FOR SHALL BE SUBSCRIBED AS IN THIS ACT PROVIDED; *and such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof, and all the provisions hereof had been complied with.*

SEC. 14. If it shall appear that a majority of all the legal voters of such towns or townships, voting at such elections, have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other chief executive officer, if incorporated towns, *and of the Supervisor in townships*, to subscribe to the capital stock of said railroad company in the name of the said town or township, the amount so voted to be subscribed, and to receive from said company the proper certificate therefor. *He shall also execute to said company*, in the name of such towns or townships, bonds bearing interest at ten per cent. per annum, which shall run for a term of not more than twenty years; and the interest on the same shall be made payable annually; and which bonds shall be signed by said president, executive officer, *or Supervisor*, and be attested by the clerk of the town or township in whose name the bonds are issued, and it shall be his duty to make out a record of the issuing of said bonds. Said bonds shall be delivered to the president or secretary of said company for the use of said company."

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UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

OCTOBER TERM, A. D., 1885.

NO.

Mahomet,
TOWN OF ~~MIDDLETOWN~~, *Plaintiff in Error*,

v.

JOHN M. QUACKENBUSH, *Defendant in Error*.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

T. C. MATHER,

ATTORNEY FOR DEFENDANT IN ERROR.

SPRINGFIELD, ILL.,
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STATEMENT OF THE CASE.

The subject matter of this action are overdue bonds of the township of Middletown, Champaign Co., Illinois.

Their recitals show the authority under which, and the purpose for which, they were issued, and are as follows:

"This bond is issued under, and by virtue of a law of the State of Illinois, entitled 'An act to amend the articles of Association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend its powers and confer a charter upon the same.' Approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held July 21st, 1866, in accordance with said act. And the faith of the township of Middletown is hereby pledged for the payment of the said principal sum and interest aforesaid."

The bonds were issued and bear date October 1st, 1867, and any irregularities in their issue, or in the special election authorizing their issue, is sought to be cured and ratified by a certain provision contained in the aforementioned act of the General Assembly of Illinois, viz: § 13, which reads as follows:

See 16 Wall. pp. 645-6.

Consequently, the question involved herein is the same that has been considered heretofore by this Court in quite a number of suits, and is yet not conclusively settled, viz. Whether it was competent for the General Assembly of Illinois, in view of § 5, Art. 9 of the State Constitution of 1848, to enact currative legislation, such as is contained in § 13 of the Act of February 28th, 1867, last above quoted.

BRIEF AND ARGUMENT.

In the case of *St. Joseph Township* v. *Rogers*, 16 Wall. 644, decided by this Court in December, A. D., 1872, bonds of this same class, issued under the same Act, and precisely like them in legal status, were involved and held to be binding upon St. Joseph township. The Court then disposing of this since much mooted question, by saying, "that argument to show that *defective* subscriptions of the kind may in all cases be ratified, when the Legislature could have originally conferred the power, is certainly unnecessary, as the question is *authoritatively settled*, by the decisions of the Supreme Court of the State, and of this Court, *in repeated instances*."

Since then the case of *Elmwood* v. *Marcy* came before this Court at its October term, 1875, involving the same question, and was decided differently from the St. Joseph case by a divided Court.

Subsequently to this again, the same question involved in quite a number of suits came before his honor Justice Harlan and Judge Treat holding the Circuit Court, Southern District of Illinois, and the *St. Joseph* v. *Rogers* decision was adhered to, and judgments sustaining the validity of several different issues of bonds issued under the same ratifying act of the Legislature, and in aid of this same railroad, were rendered, from which writs of error or certificates of division, were taken to the October term of this Court, 1883, in the cases of

Township of St. Joseph
v. No. 913.
John M. Quackenbush.

Township of Urbana
v. No. 909.
Matthew M. Boles.

Township of Urbana
v. No. 911.
First National Bank of Danville.

Township of Urbana
v. No. 910.
Aetna Life Insurance Co.

City of Quincy
v. No. 1043.
Cook, Executrix, etc.

where all these judgments were affirmed by a divided court, and have since been collected.

The question now recurs in these still pending suits whether these fragmentary or remaining issues of bonds remaining unpaid, must be paid in accordance with the direct ruling of this Court in *St. Joseph* v. *Rogers*, and in accordance with the *practical effect of these affirmances* by a divided court in the cases submitted at the term above mentioned, or must the divided opinion of this Court in the single case of *Elmwood* v. *Marcy* become now the law of this question?

His Honor, Judge Davis, in delivering the opinion in *Elmwood* v. *Marcy*, says:

"We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren *who agree to this opinion might take* a different view of them. * * * There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but on the contrary settled uniformity."

In that case a minority of this Court filed a strong dissenting opinion, in which they show a contrary understanding about there having been a *settled uniformity* in the Illinois Supreme Court decisions upon this controlling question.

So that according to His Honor, Judge Davis' statement in that opinion, had not the majority of the Court with him thought that *there had been a settled uniformity* upon this controlling question in the decision of the Illinois Supreme Court, we may assume the *Elmwood case* would have followed the Rogers decision instead of departing from it, as in that event some of the Court which agreed with him might have taken a different view.

Whether or not there had been a settled uniformity in the Illinois Supreme Court decisions upon this controlling question prior to the issue of these bonds is just what produces the whole controversy and difference of opinion in these cases.

The Elmwood decision containes the doctrine, that where the State Supreme Court has taken different views of its constitutional provisions or laws at different times, there this Court will follow the first and ignore the latter, so that rights acquired under the former decisions may not be lost under a change in the opinion of the Court.

2 Otto. p. 294.

Now supposing it to be made to appear that there has been no settled uniformity in the decisions of the Illinois Supreme Court upon this question, then, according to the Emwood decision itself, this court will disregard the later State Court decisions and follow those which stood as the law when the bonds were issued.

As we have said, these Middletown bonds were issued October 1, 1867.

It is conceded on all sides of the argument that long after that date, and commencing in 1871, the Illinois Supreme Court has been holding that under the provision of the Illinois Constitution referred to, it was not competent for the Illinois Legislature to clothe the Supervisor and Town Clerk of a township with power to incur a town obligation to aid a railroad with its bonds without a vote of the electors under a law in existence at the time, authorizing the vote. That to do so would be to force a debt upon its people without their consent.

But the material inquiry is not what that Court has held *since* these bonds issued nor how often they have *since* so held, but, what had that Court held or intimated in this direction *before*, and up to, their issue; because, if they held one way *before*, and another way *since*, their issue the rule in the Elmwood case

authorizes the ignoring of the later decisions so as to save rights acquired before a change in the opinion of the Court.

Upon this important inquiry, numerous arguments have already been submitted, supported by authority, and it may hardly be justifiable to go over the ground again in detail without being irksome to the Court. Suffice it in this case to merely refer again to the leading points and authorities in our behalf.

We insist that the doctrine of the Illinois Supreme Court was radically different before, and up to, the date of issue of these bonds, as to the legislative power under the Constitution of 1848, to ratify or cure the void acts of municipalities incurring debts to be paid by taxation, from what its doctrine has since been.

In *Cowgill* v. *Long*, 15 Ills., 202, a school tax voted contrary to the law by the electors of a school district was held by the Court to be void, and yet the subject of legislative ratification without being obnoxious to Section 5, Article IX, of the Constitution, (decided in 1853).

The same limitation in Section 5 of Article IX, against the legislature conferring power to tax on other than corporate authorities applies to a school district that does to a township.

The *electors* of a school district are *its* corporate authorities, so they are of a township (by the recent decisions of our Supreme Court). 97 Ill. 211, *Town of Windsor* v. *Hallett*.

If, then, this provision of the Constitution is not violated by the legislature ratifying the absolute void act ot the electors of a school district, and its doing so is not forcing a debt on them without their consent otherwise manifested than by this empty vote, why is it more violative of this provision, or more the forcing of a debt on a township by the legistature ratifying the void election of *its* electors?

In the precise *principle* involved, we can see no difference between what the Illinois Supreme Court justified in this decision, in 1853 as to school districts, and what that Court has since 1871 refused to justify as to townships.

Both school districts and townships are expressly named in § 5 of Art. IX. And the same limitation necessarily applies to the Legislative dealing with both.

Where is the possible difference in principle between Legislative ratification of the void act of the electors of one, and that of the other?

If constitutional to ratify one in 1853, why not equally so to ratify that of the other in 1867?

In *Keithsburg* v. *Frick*, 34 Ill., 405, (decided in 1864), the Supreme Court held it competent for the Legislative to ratify the void subscription to railroad stock, made by a president and board of trustees of a village, and without other consent of its people by vote or otherwise.

The Supreme Court has since attempted to distinguish that case from a township, on the ground that the trustees were elected *directly by the people*, for the purpose of imposing taxation, and therefore to ratify their *void* subscription or tax was not forcing a debt on the people

Why is it not less forcing a debt on the people to ratify the *void act* (or consent) of the *electors themselves*, than that of their mere representatives?

What the electors themselves attempt to do, though it may be without legal authority at the time, at least shows *their consent* to it, whereas a majority of them may have never voted for the repre-

sentatives, or contemplated in the remotest degree that they would ever attempt a subscription to railroad stock.

If ratification is justifiable at all, why not ratify the void act of the *principle* rather than that of the *agent*?

So that, when it comes to the real principle involved, there is no distinction between the case of a township where its *electors themselves* have voted consent to subscribe and issue bonds, and the act of village trustees doing it, except that it is more equitable to ratify what the electors themselves have given consent to than the acts of their agents, which may not have been in the contemplation of the *electors* at all.

If the *electors* of a township had never voted consent, and the legislative attempt was to authorize the supervisor and clerk without such vote, to subscribe and issue the bonds, then the case might be different.

Section 13 of the Act of Feb. 28, 1867, only attempts to authorize the subscription and bonds where there has been a favorable vote of the *electors* therefor, and limits the subscription and bonds in amount to the sum so voted.

16 Wall. p. 646.

Such ratification then as this section 13 contemplates is *not* conferring the power of taxation on other than the corporate authorities of a township, because the corporate authorities (the electors) have exercised that power for themselves, have voted the bonds, given their consent, irregularly it is true; and yet all that the Legislature seeks to do by § 13, is to ratify and legalize this irregular consent, and vote. So that it is no longer a constitutional question under § 5 of Art. IX, but simply a question whether the Legislature can ratify and cure an irregular exercise of power on the part of the *corporate* authorities themselves.

This they can always do where it would have been competent to have conferred the power in the first instance; and who will question but that the legislature, under the provision in question, could have conferred power in advance upon the electors of the township to have burthened themselves with this debt by vote? Hence subsequent sanction is equivalent to original authority.

Cooley's Con. L., 4th Ed., ch. 8. p. 278 (n. 2.)
Ibid ch. 22, pp. 474–5.
In re. E. R. Tuller, 79 Ill., 99.
U. S. Mfg Co. v. *Gross*, 93 Ill., 483.
Cowgill v. *Long*, 15 Ill., 202.
Keithsburg v. *Frick*, 34 Ill., 405.

Attorneys representing the bonds in the different cases referred to have in their briefs heretofore filed, with labor and painstaking, collated the early Illinois decisions which show that prior to the issue of these bonds the doctrine of the court was that the legislature had supreme control over townships and other municipalities named in Section 5 of Article IX. and might impose debts upon them *without their consent.* We borrow their citations and insert here

Town of Freeport v. *Board*, 41 Ill., 495.
Bush v. *Shipman*, 4 Scam., 186.
County of Richland v. *County of Lawrence*, 12 Sec. 1.
Trustees v. *Tateen*, 13 Ill., 28.
Bradley v. *Case*, 3 Scam., 585.

The cases relied upon by our opponents in 51 and 53 Ill., as holding a different doctrine from *Cowgill* v. *Long* and *Keithsburg* v. *Frick*, were decided *after* these bonds issued, and in 1869, and hence do not involve the present question at all, for the authorities there,

upon which the legislature conferred the power of taxation, were neither the electors (as here) nor their suffrage representatives.

It has only been since 1871 in the case of *Marshall* v. *Silliman*, 61 Ill., 218 and subsequent cases that the Illinois Supreme Court has announced a doctrine that at all conflicts with our rights of property in these bonds.

Hence our rights are within the protection of the specific rule of this Court reiterated in the Elmwood case that the former decisions of the State Court will be followed instead of the latter, so as to prevent a loss of rights by a change in the opinion of the Court.

One of the best evidences that the Illinois Supreme Court decisions prior to the issue of these bonds were in harmony with their validity, is the fact that this Court in 1872, (and before the appearance of the *Marshall* v. *Silliman* decision) announced that the act of Feb. 28, 1867, was sanctioned by *repeated* adjudications of that Court. Referring doubtles to *Cowgill* v. *Long*, *Keithsburg* v. *Frick*, and perhaps some of its decisions where it sanctioned the right of the Legislature to cure void acts of married women, etc., by curative legislation.

Had it *then* been, that *there was* a "*settled uniformity*" *as subsequently* announced in *Elmwood* v. *Marcy* in the decisions of the Illinois Supreme Court *contrary* to the constitutionality and validity of such character of curative legislation as is contained in § 13, of the Act of Feb. 28, 1867, instead of the point *being authoritatively settled* (favorably to the constitutionality and validity) by decisions of the Supreme Court of the State in *repeated instances*" (as announced prior in *St. Joseph* v. *Rogers*.) How is it that not a dissenting opinion of this Court was registered in the *St. Joseph* v. *Rogers* case?

The report of the *Rogers* case in 16 Wall., containing the instructions of the Circuit Court excepted to, and appealed from, and the points and briefs relied on by counsel *pro* and *con*, raised the identical points of controversy now before the Court in these subsequent suits. The question of the conflict of this curative act of the Legislature with the constitutional provisions cited, under the *then* Illinois decisions, was fully raised, considered and adjudicated.

16 Wall. pp. 654 to 663, both inclusive, and notes at bottom.

The case went off upon the solemn adjudication that such curative legistation in Illinois, under its constitution of 1848, and its "repeated" Supreme Court adjudications thereon was competent, constitutional, and valid, and not a warning voice of the Court registered against it. Three years thereafter intervened with this high record before the commercial world, inviting monied interests to invest in this large issue of 10 per cent. bonds to the Danville, Urbana, Bloomington & Pekin railroad, with the assurances they were doubly adjudged valid, both by the United States and the Illinois Supreme Courts.

Then comes the divided opinion of this Court in *Elmwood* v. *Marcy*, in 1875, and the still further divisions at the October term, 1883.

There is a legal principle sometimes acted upon by Courts that, where it is *doubtful* whether the corporation has power to issue bonds, yet if the municipal authorities have constued their charter, as giving the power, and the bonds have been issued, and are in the hands of *bona fide* purchasers for value, the Court will adopt the municipal constrnction.

Van Hostrup v. *Madison City*, 1 Wall. 297.

Meyer v. *City of Muscatine*, *Id.* 391.

James v. *Milwaukee*, 16 Wall. 162.
Adams v. *Lawrence Co.*, 2 Pitts R. 64.
Woodhull v. *Beaver Co.*, 3 Wall. Jr., 278.
Clemens C. S. 28.

Upon this question, where the Courts differ so, why should not the power of the towns be said to be *doubtful*; and where their officers and electors have *construed* the act of February 28, 1867, as giving them the power to subscribe and issue bonds, and those bonds have been sold, and are in the hands of *bona fide* purchasers, why should not this equitable rule of law apply and throw the loss upon the towns whose voluntary acts, and that of their electors, put them upon the market?

The towns also obtained the railroads and stock for which they subscribed these aids, and is it equitable, or lawful, that they should retain the fruits of, and yet repudiate their contracts?

Quoting from this Court in a former decision—"In Sedgwick on statutory and constitutional law, it is said—it must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, *a party who has had the benefit of the agreement* cannot be permitted in an action founded on it *to question its validity*. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

Township of Pine Grove v. *Talcott*, 19 Wall. 678.

It was a question of "power to contract" in these cases. If this act of the Legislature was unconstitutional, then these towns had no power to contract, because the law was void and conferred no power to act under it.

Just so is the Pine Grove case quoted from. It was a question whether the law of Michigan, under which the town sought to aid a railroad, was *constitutional*, and this Court quoted the law from Sedgwick as applicable.

The record in this case discloses but one feature not in records of similar suits before this Court at its last term, viz: The attempt of the town to prove that an actual majority of the voters of the town did not participate in the special election. But this precise point was made and overruled in *St. Joseph* v. *Rogers*, upon a large array of authorities.

16 Wall. p. 664.

To the authorities there cited in the note, may be added the case of

Melvin v. *Lizenby*, 72 Ill., 63.

We can add nothing to the answer to this objection by the Court in the Rogers case (p. 664). The law and decisions *mean*, a majority of those voting at the special election, not a majority of the legal voters residing in the town at the election.

The law presumes defendant in error to be a purchaser before due, for value, without notice.

Bank of Metropolis v. *New England Bank*, 1 How. 239.
Chambers County v. *Clews*, 21 Wall. 323.
Carpenter v. *Longan*, 16 Wall. 273.

Hence the recitals in the bonds as to the vote, and compliance with the law, estop the town to gainsay their regularity, as this charter imposes the duty on the officers issuing the bonds to determine what their recitals declare.

16 Wall. 665.